

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Robert G. Taub, Acting Chairman;
Nanci E. Langley, Vice Chairman;
Mark Acton; and
Tony Hammond

Ex Parte Communications

Docket No. RM2016-4

NOTICE OF PROPOSED RULEMAKING
REGARDING EX PARTE COMMUNICATIONS

(Issued January 8, 2016)

I. INTRODUCTION

This rulemaking is initiated by the Postal Regulatory Commission (Commission) to fulfill its responsibilities under the Postal Accountability and Enhancement Act (PAEA), Pub. L. No. 109-435, 120 Stat. 3218 (2006). The proposed rules amend existing Commission rules concerning ex parte communications¹ and obsolete rules no longer applicable under the PAEA are removed. Existing rules are brought up to

¹ Rules concerning ex parte communications control all interactions, oral or in writing (including electronic), between Commission decision-making personnel, and the United States Postal Service (Postal Service) or public stakeholders in matters before the Commission.

date to be consistent with the recommended approach to agency treatment of ex parte communications² and are further reorganized for clarity.

The ex parte communications rules currently appear in three areas of the Commission's applicable Code of Federal Regulations (CFR). This rulemaking proposes to replace, in their entirety, the rules currently appearing at 39 CFR, part 3000, subpart B. This rulemaking also proposes to reorganize the rules currently appearing at § 3001.7, including a definition appearing at § 3001.5(o), and moves this material to a new 39 CFR, part 3008.

II. BACKGROUND

Applying ex parte communications principles promotes transparency and openness in government concerning its interactions with public stakeholders. See Recommendation 2014-4 at 2. These principles help prevent the perception that an entity may gain an unfair advantage over another by communicating inappropriately with the Commission on an ex parte basis. *Id.* at 3. These principles also reduce the risk that Commission decisions will be challenged in court based on alleged reliance on information obtained through inappropriate ex parte communications. Sferra-Bonistalli Report at 77-78.

By statute, the Commission is only required to place restrictions on ex parte communications where the Commission must provide an opportunity for hearing on the record pursuant to 5 U.S.C. 556-557. Under the PAEA, this is limited to nature of postal service cases pursuant to 39 U.S.C. 3661.

Historically, the Commission's regulations also extended restrictions on ex parte communications to post office appeal cases pursuant 39 U.S.C. 404(d)(5,6) and complaint cases pursuant to 39 U.S.C. 3662. The Commission views this as

² See Esa L. Sferra-Bonistalli, *Ex Parte Communications in Informal Rulemaking*, May 1, 2014, (prepared for consideration of the Administrative Conference of the United States) (Sferra-Bonistalli Report); Administrative Conference of the United States, Administrative Conference Recommendation 2014-4, June 6, 2014, (Recommendation 2014-4).

appropriate because of the potential impact on participants and their associated rights that may result under these types of proceedings. The proposed rules continue to impose restrictions on ex parte communications for the same statutorily required and historical proceedings described above. See proposed 39 CFR part 3008.

Many other types of proceedings come before the Commission other than nature of service, post office closing, and complaint proceedings that are mentioned above.³ But there is no statutory requirement to impose ex parte communications restrictions in these other proceeding types. However, the Commission believes that the aforementioned ex parte principles suggest that all proceedings before the Commission should be treated the same. A consistent policy applicable to all docket types is the simplest to understand and the most efficient to administer. Therefore, concomitant with the publishing of the final rules on ex parte communications concerning nature of service, post office closing, and complaint proceedings, the Commission will implement an internal policy requiring all docket types to adhere to nearly identical ex parte communications restrictions. The internal policy will be referenced in proposed 39 CFR part 3000, subpart B.

The proposed rules and the internal policy will be identical as far as prohibiting ex parte communications for matters before the Commission. They also will be identical in requiring a remedy of disclosure when an ex parte communication occurs. Because of the statutory requirements, there are differences in the types of sanctions, as will be explained below, that may be imposed when an ex parte communication occurs in a nature of service, post office closing, or complaint proceeding versus other types of proceedings. The Commission files the internal policy as Library Reference PRC-LR-RM2016-4/1 for comparison purposes.

³ For example, the Commission administers the Annual Compliance Report (ACR), Competitive Product (CP), Mail Classification (MC), Market Test (MT), Public Inquiry (PI), Rate/Request (R), Rulemaking (RM), and Annual Tax Computation (T) proceedings.

III. SECTION-BY-SECTION ANALYSIS OF PROPOSED RULE CHANGES

The rules in 39 CFR part 3000 are applicable only to Commission personnel.

Rule 3000.735-501 Ex parte communications prohibited. Existing rule 735-501 prohibits ex parte communications by Commission decision-making personnel in certain contested matters before the Commission. The instant rulemaking attempts to address several issues with the existing rule. First, there is significant redundancy between this requirement and the requirements of existing rule 3001.7. Second, it is difficult to identify who qualifies as Commission decision-making personnel without referring to other unrelated sections of the CFR. Third, the rule currently refers to rate and classification cases under 39 U.S.C. 3624, which were eliminated under the PAEA. Fourth, no guidance is offered to Commission personnel on how to treat ex parte communications outside the scope of the specific docket types mentioned under the existing rule.

The proposed rule addresses these concerns by restructuring rule 3000.735-501. First, the substance of existing rule 3000.735-501 is moved to proposed part 3008 and consolidated with material from existing rule 3001.7.⁴ Existing rule 3000.735-501 is revised to inform Commission personnel of the Commission's general policy concerning ex parte communications. See proposed rule 3000.735-501(a). This policy requires uniform treatment for ex parte communications in all proceeding types before the Commission. There is a general prohibition on ex parte communications on matters before the Commission with disclosure as the primary remedy for inadvertent ex parte communications. The proposed rule also provides notice that the internal Commission policy is available on the Commission's public website. The intent of making the policy public is to make external stakeholders aware of how Commission personnel will treat ex parte communications for all proceeding types.

⁴ Proposed part 3008 in part identifies the applicable decision-making personnel and removes references to previous rate and classification cases.

Finally, Commission personnel are directed to proposed part 3008. See proposed rule 3000.735-501(b). This part provides the specific requirements concerning nature of service proceedings, post office closing, and complaint proceedings. Except for the differences in potential sanctions for violation of the rule, the internal policy (applicable to all case types) and the requirement of part 3008 (applicable to a subset of case types) are intended to be consistent.

Rule 3000.735-502 Public record of ex parte communications. The existing rule requires Commission personnel to disclose all ex parte communication in certain matters before the Commission. This rulemaking proposes to move the substance of the disclosure requirement to proposed rule 3008.6 and reserves rule 3000.735-502 for future use.

Rule 3001.5(o) Definitions. Ex parte communication. The existing rule provides the current definition of ex parte communications. This rulemaking proposes to move the definition to rule 3008.2. The definition will be updated consistent with the recommended agency treatment of ex parte communications. The updated definition adds that electronic communications qualify as ex parte communications. The definition also provides a detailed list of exceptions to the otherwise broad scope of covered communications. Existing rule 3001.5(o) is reserved for future use.

Rule 3001.7 Ex parte communications. The Commission's ex parte communications rules (applicable to the pre-PAEA subset of case types) are currently located in section 3001.7. The Commission proposes to move the substance of these rules to new part 3008. The amended rules will address the requirements for nature of service proceedings, post office closing, and complaint proceedings that come before the Commission. The rules will be applicable to Commission personnel, the Postal Service, and all outside entities that interact with the Commission.

Rule 3008.1 Applicability. Proposed rule 3008.1 specifies that the rules provided within part 3008 are applicable to nature of service, post office closing, and complaint proceedings. It also provides the Commission with discretion to impose ex parte

communication restrictions concerning other matters that come before the Commission, where appropriate.

Rule 3008.2 Definition of ex parte communications. Proposed rule 3008.2 begins with a broad definition of ex parte communications and then limits the scope of the definition through a series of exceptions. The broad definition includes all communications, oral or written (including electronic), between Commission decision-making personnel, and the Postal Service or public stakeholders regarding matters before the Commission. The exceptions limit the scope of the definition to exclude: (1) documents filed using the Commission's docketing system; (2) communications during widely publicized Commission meetings, hearings, or other publicly noticed events for which a summary of the meeting, hearing or event is provided for the record; (3) communications during off-the-record technical conferences or publicly noticed pre-filing conferences for nature of service cases; (4) questions and replies concerning Commission procedures and uncontested status inquiries; and (5) communications not material to the matter before the Commission. The approach to this rule is intended to be consistent with the Sferra-Bonistalli Report and the Administrative Conference's Recommendation 2014-4 with tailoring to the Commission's operations.

Rule 3008.3 Definition of a matter before the Commission. Proposed rule 3008.3 defines when a matter is or is not "before the Commission" for purposes of determining when the ex parte communication rules apply. The proposed rule provides the Commission with discretion to apply ex parte communications restrictions at any time, but no later than when a request to initiate a proceeding is received or when the Commission notices a proceeding. It also imposes ex parte communication restrictions when there is an affirmative action announcing, or active preparation of, an actual request with intent to file in a reasonable period of time. The effect of this rule is to limit the application of the ex parte communications rules to exclude most, if not all, communications until a matter has actually been initiated by an outside entity or noticed by the Commission (or either of these actions is imminent).

Rule 3008.4 Definitions of persons subject to ex parte communications rules.

Proposed rule 3008.4 defines “Commission decision-making personnel,” the “Postal Service,” “public stakeholders,” and “Commission non-decision-making personnel,” for the purposes of the ex parte communications rules. The proposed rule incorporates the definitions of “Commission decision-making personnel,” and “Commission non-decision-making personnel,” from existing rule 3001.7(a), and broadens the definition to include contractors, consultants, and others hired to assist with analysis and decisions. The proposed rule, for the first time, includes definitions for Postal Service personnel and other public stakeholders.

Rule 3008.5 Prohibitions. Proposed rule 3008.5(a) imposes a general prohibition of ex parte communications between Commission decision-making personnel and the Postal Service or other public stakeholders. The proposed rule adds that Commission decision-making personnel are prohibited from relying upon any information obtained through ex parte communications. See rule 3008(b). Finally, proposed rule 3008(c) clarifies that proposed rule 3008(a) does not constitute authority to withhold information from Congress.

Rule 3008.6 Required action upon ex parte communications. Proposed rule 3008.6 mirrors existing rules 3001.7(b)(3)-(5) setting forth the actions required when ex parte communications occur. Three steps are outlined. Commission decision-making personnel are first required to decline to listen to ex parte communications. If ex parte communications occur regardless of efforts to prevent such communications, the communications must be disclosed. Finally, under certain circumstances, there may be an opportunity for others to rebut the contents of the ex parte communications.

Rule 3008.7 Penalty for violation of ex parte communication rules. Proposed rule 3008.7 mirrors existing rules 3001.7(d)(1) and (2), outlining the penalties for violations of the ex parte communications rules. This includes providing possible violators of the rules with an opportunity to show cause why their claim should not be dismissed, denied, disregarded, or otherwise adversely affect the outcome of the proceeding.

IV. INTERNAL POLICY AND LIBRARY REFERENCE

Library Reference PRC-LR-RM2016-4/1 is a copy of the Commission's written employee policy regarding ex parte communications. The Commission intends to adopt this policy to further its goal of transparency and openness in all dockets. Though ex parte restrictions are only statutorily required by regulation for nature of service, post office appeals, and complaint matters, the Commission seeks to alleviate any real or perceived unfairness in its communications with stakeholders in all cases and thus creates this new ex parte policy.

The policy will be posted to the Commission website at www.prc.gov if and when the Commission adopts final rules pursuant to this proceeding. Although the attached employee policy will not be binding on persons outside of the Commission, public disclosure of the document will better inform outside entities concerning the Commission's treatment of ex parte communications in all proceeding types that may come before the Commission. The Commission welcomes public comment on the policy to identify problems and to ensure consistency with the proposed rules discussed herein and with the Commission's regulatory scheme as a whole.

V. PUBLIC REPRESENTATIVE

Pursuant to 39 U.S.C. 505, Patricia A. Gallagher is appointed the officer of the Commission (Public Representative) to represent the interests of the general public in the captioned docket.

VI. SOLICITATION OF COMMENTS

Interested persons are invited to comment on the rules proposed in this rulemaking. Interested persons may also comment on the attached internal Commission policy concerning ex parte communications to ensure consistency with the proposed rules. Comments are due no later than 30 days, and reply comments no later than 45 days, after publication of this Notice in the *Federal Register*.

VII. ORDERING PARAGRAPHS

It is ordered:

1. The Commission establishes Docket No. RM2016-4 for the purpose of considering changes to the Commission's rules governing ex parte communications.
2. The Commission proposes to amend existing ex parte communications rules appearing at 39 CFR part 3000, subpart B, and to move and amend existing ex parte communications rules previously appearing at § 3001.5(o) and § 3001.7 into new 39 CFR part 3008.
3. Pursuant to 39 U.S.C. 505, the Commission appoints Patricia A. Gallagher to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.
4. Interested persons may submit initial comments no later than 30 days from the date of publication of this Notice in the *Federal Register*.
5. Reply Comments may be filed no later than 45 days from the date of publication of this Notice in the *Federal Register*.
6. The Secretary shall arrange for publication of this Notice in the *Federal Register*.

By the Commission.

Stacy L. Ruble
Secretary

List of Subjects

39 CFR Part 3000

Conflicts of interests, Ex parte communications

39 CFR Part 3001

Administrative practice and procedure, Confidential business information, Ex parte communications, Freedom of information, Sunshine Act

39 CFR Part 3008

Administrative practice and procedure, Ex parte communications

For the reasons discussed in the preamble, the Commission proposes to amend chapter III of title 39 of the Code of Federal Regulations as follows:

Part 3000—STANDARDS OF CONDUCT

1. The authority citation for part 3000 is revised to read as follows:

Authority: 39 U.S.C. 503; 504, 3603; E.O. 12674; 54 FR 15159; 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 56 FR 42547, 3 CFR, 1990 Comp., p. 396, 5 CFR parts 2634 and 2635.

2. Revise subpart B of part 3000 to read as follows:

Subpart B—Ex Parte Communications

Sec.

3000.735-501 Ex parte communications prohibited.

3000.735-502 [Reserved]

§ 3000.735-501 Ex parte communications prohibited.

(a) The Commission maintains a written employee policy regarding ex parte communications applicable to all interactions, oral or in writing (including electronic), between Commission decision-making personnel, and the United States Postal Service or public stakeholders in matters before the Commission. It is the responsibility of all Commission personnel to comply with this policy, including the responsibility to inform persons not employed by the Commission of this policy when required. The policy is available for review on the Commission's Web site at www.prc.gov.

(b) Additional ex parte communications requirements, applicable to specific docket types, are described in part 3008 of this chapter.

§ 3000.735-502 [Reserved]

Part 3001—RULES OF PRACTICE AND PROCEDURE

3. The authority citation of part 3001 continues to read as follows:

Authority: 39 U.S.C. 404(d); 503; 504; 3661.

4. Amend § 3001.5 by revising paragraph (o) to read as follows:

§ 3001.5 Definitions.

(o) [Reserved]

5. Revise § 3001.7 to read as follows:

§ 3001.7 [Reserved]

6. Add part 3008 to read as follows:

Part 3008—EX PARTE COMMUNICATIONS

Sec.

3008.1 Applicability.

3008.2 Definition of ex parte communications.

3008.3 Definition of a matter before the Commission.

3008.4 Definitions of persons subject to ex parte communication rules.

3008.5 Prohibitions.

3008.6 Required action upon ex parte communication.

3008.7 Penalty for violation of ex parte communication rules.

Authority: 39 U.S.C. 404(d)(5); 503; 504; 3661(c); 3662.

§ 3008.1 Applicability.

(a) The rules in this section are applicable to the Commission proceedings identified in paragraphs (b) through (e) of this section.

(b) The nature of postal service proceedings conducted pursuant to 39 U.S.C. 3661(c).

(c) The appeals of Postal Service decisions to close or consolidate any post office conducted pursuant to 39 U.S.C. 404(d)(5).

(d) Rate or service complaints conducted pursuant to 39 U.S.C. 3662.

(e) Any other matter in which the Commission, in its discretion, determines that it is appropriate to apply the rules of this section.

§ 3008.2 Definition of ex parte communications.

(a) Subject to the exceptions specified in paragraph (b) of this section, ex parte communications include all communications, oral or written (including electronic), between Commission decision-making personnel, and the Postal Service or public stakeholders regarding matters before the Commission.

(b) Ex parte communications do not include:

- (1) Documents filed using the Commission's docketing system;
- (2) Communications during the course of Commission meetings or hearings, or other widely publicized events where the Commission provides advance public notice of the event indicating the matter to be discussed, the event is open to all persons participating in the matter before the Commission, and a summary of the event is provided for the record;
- (3) Communications during the course of off-the-record technical conferences associated with a matter before the Commission, or the pre-filing conference for nature of service cases required by § 3001.81 of this chapter, where advance public notice of the event is provided indicating the matter to be discussed, and the event is open to all persons participating in the matter before the Commission;
- (4) Questions concerning Commission procedures, the status of a matter before the Commission, or the procedural schedule of a pending matter, where these issues are not contested matters before the Commission; and
- (5) Communications not material to the matter before the Commission.

§ 3008.3 Definition of a matter before the Commission.

(a) A matter is before the Commission at such time as the Commission may designate, but in no event later than the earlier of the filing of a request to initiate a proceeding or the Commission noticing a proceeding.

(b) A matter is also before the Commission at such time as the person responsible for the communication has knowledge that a request to initiate a proceeding is expected to be filed.

(c) The following explanations apply:

(1) A matter is no longer before the Commission upon the issuance of the final order or decision in the docketed matter;

(2) A matter is again before the Commission upon the filing of a request for reconsideration. The matter remains before the Commission until resolution of the matter under reconsideration;

(3) A matter is again before the Commission upon the remand of a Commission's final decision or order by an appellate court. The matter remains before the Commission until resolution of the matter under remand; and

(4) The mere potential that a request may be filed does not place a matter before the Commission. An affirmative action announcing, or actively preparing, an actual request with the intent to file within a reasonable period of time must be present.

§ 3008.4 Definitions of persons subject to ex parte communication rules.

(a) Commission decision-making personnel include:

(1) The Commissioners and their staffs;

(2) The General Counsel and staff;

(3) The Director of the Office of Accountability and Compliance and staff;

(4) Contractors, consultants, and others hired by the Commission to assist with the Commission's analysis and decision; and

(5) Any other employee who may reasonably be expected to be involved in the decisional process.

(b) The Postal Service includes all Postal Service employees, contractors, consultants, and others with an interest in a matter before the Commission. Any interaction between the Postal Service and Commission decision-making personnel concerning a matter before the Commission expresses an interest in the matter before the Commission.

(c) Public stakeholders include all other persons not previously described, with an interest in a matter before the Commission. This includes the Commission non-decision-making personnel identified in paragraph (d) of this section. Any interaction between a public stakeholder and Commission decision-making personnel concerning a matter before the Commission expresses an interest in the matter before the Commission.

(d) Commission non-decision-making personnel include:

(1) All Commission personnel other than decision-making personnel;

(2) Commission personnel not participating in the decisional process owing to the prohibitions of § 3001.8 of this chapter regarding no participation by investigative or prosecuting officers;

(3) The Public Representative and other Commission personnel assigned to represent the interests of the general public pursuant to 39 U.S.C. 505 in the specific case or controversy at issue (regardless of normally assigned duties); and

(4) Contractors, consultants, and others hired by the Commission to provide an independent analysis of issues before the Commission (and Commission employees assigned thereto).

§ 3008.5 Prohibitions.

(a) Ex parte communications between Commission decision-making personnel, and the Postal Service or public stakeholders is prohibited.

(b) Commission decision-making personnel shall not rely upon any information obtained through ex parte communications.

(c) Paragraph (a) of this section does not constitute authority to withhold information from Congress.

§ 3008.6 Required action upon ex parte communications.

(a) Commission decision-making personnel who receive ex parte communications relevant to the merits of the proceeding shall decline to listen to such communications and explain that the matter is pending for determination. Any recipient thereof shall advise the communicator that the communication will not be considered, and shall promptly and fully inform the Commission in writing of the substance of and the circumstances attending the communication, so that the Commission will be able to take appropriate action.

(b) Commission decision-making personnel who receive, or who make or knowingly cause to be made, ex parte communications prohibited by this part shall promptly place, or cause to be placed, on the public record of the proceeding:

- (1) All such written communications;
- (2) Memoranda stating the substance of all such oral communications; and
- (3) All written responses, and memoranda stating the substance of all oral responses, to the materials described in (b)(1) and (b)(2) of this section.

(c) Requests for an opportunity to rebut, on the record, any facts or contentions contained in an ex parte communication which have been placed on the public record of the proceeding pursuant to paragraph (b) of this section may be filed in writing with the Commission. The Commission will grant such requests only where it determines that the dictates of fairness so require. In lieu of actually receiving rebuttal material, the Commission may in its discretion direct that the alleged factual assertion and the proposed rebuttal be disregarded in arriving at a decision.

§ 3008.7 Penalty for violation of ex parte communication rules.

(a) Upon notice of a communication knowingly made or knowingly caused to be made by a participant in violation of § 3008.5(a), the Commission or presiding officer may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the participant to show cause why his/her claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(b) The Commission may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the Commission, consider a violation of § 3008.5(a) sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur.